No. 80-716

In the Supreme Court of the United States

OCTOBER TERM, 1980

LONE STAR STEEL COMPANY
Petitioner

v.

NATIONAL LABOR RELATIONS BOARD
Respondent

and

UNITED MINE WORKERS OF AMERICA
Intervenor

REPLY BRIEF IN 80-716

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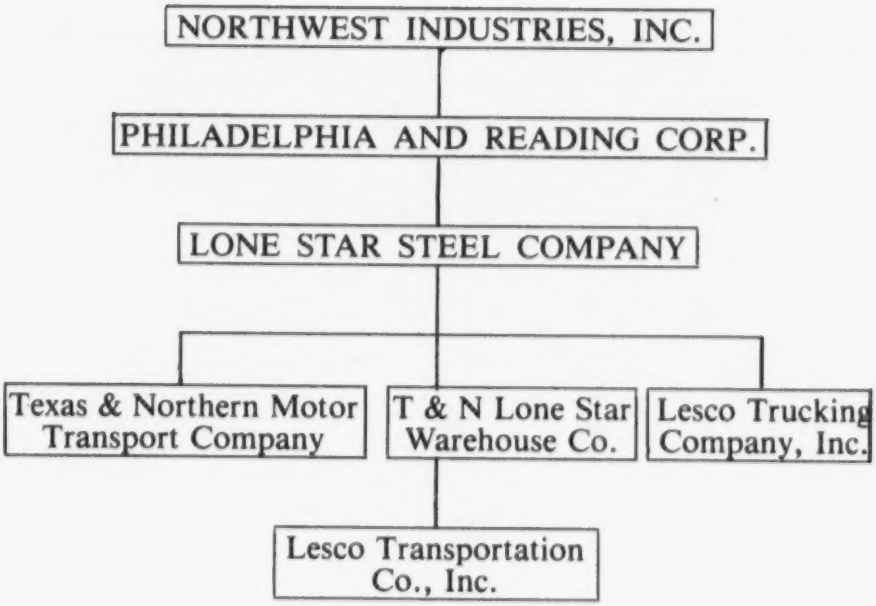
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REPLY TO BRIEFS OPPOSING CERTIORARI

A. Whether the successor language is a mandatory subject within the meaning of §8(d).

The NLRB and Intervenor's arguments underscore the critical need for this Court to review, and finally settle, the vital issues of Federal Labor Law raised in this case. Contrary to the suggestions otherwise, (Int. Resp. Br. pp. 11-12) (NLRB Opp. Br. p.4)[1] it is critical to all industry for this Court to decide

[1] "Pet. App." refers to the Appendix to Lone Star Steel's Petition No. 80-716. The Appendix to the NLRB's Cross-Petition in No. 80-940 is hereafter referred to as "Cr. Pet. App." or "Cr. Pet. p._____." Reference to the NLRB's Brief in Opposition in No. 80-716 will be "NLRB Opp. Br. p._____." References to the Intervenor's Response in No. 80-716, will be "Int. Resp. Br. p._____."

whether, and if so to what extent, weight should be given to the factors of (a) the managerial right to alienate assets free of encumbrance,[2] and (b) a purchaser's right to acquire same free of encumbrance,[3] as balanced against the unit employees' interest in maintaining the *status quo* by binding the contract to all assets of an employer. Petitioner argues that the decision below allows too great an intrusion into these clearly non-mandatory areas.

This successor clause allows bargaining for a form of union asset ownership. Petitioner suggests that the confusion and potential chaos caused by the successorship ruling below, and

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Footnote 1 (Continued)

In Case No. 80-940, the NLRB has filed a Cross-Petition for Certiorari seeking review of the "coal lands" clause portion of this decision. Lone Star has opposed certiorari there. References to Lone Star's Brief in Opposition in No. 80-940 will be "Co. Opp. Brief."

[2] Petitioner relied, in part, on remarks by Justice Stewart in his concurring opinion in *Fibreboard Paper Products Corp. v. NLRB,* 379 U.S. 203 at 223 (1964). He observed that there may well be an area of managerial prerogative beyond the scope of §8(d) even though the decisions made have a vital impact on jobs. He wrote that conceivably *every* subject impacts the unit employees, but this impact alone does not render any subject a mandatory subject under §8(d).

[3] Petitioner argued that the so-called "successorship" cases created a doctrine that bargains between employers and unions *vis a vis* one unit, cannot bind so-called "stranger" employers or units unless assumed directly or impliedly by the new employers. Therefore, the purchaser's and seller's managerial interests must be considered as a vital factor in the questions of whether a present bargain *vis a vis* a unit can require purchasers to assume not only covenants about wages, but the union itself as a condition precedent to the bargain. The entrepreneurial and managerial control of a business, though impacting on the employees, should not itself be a mandatory subject. This successor clause achieves precisely that result. See *NLRB v. Burns Int. Security Services, Inc.,* 406 U.S. 272 (1972); *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 549 (1964); *Howard Johnson Co., Inc. v. Detroit Local Joint Executive Board, Hotel and Restaurant Employees and Bartenders Int'l Union,* 417 U.S. 249 at n.3 (1974).

the importance of the issues raised, warrant review.

NLRB and Intervenor argue this kind of clause is merely advanced "effects" bargaining which in no way hampers or intrudes into the "decision" to sell itself. (NLRB Opp. Br. p.5, n.5) (Int. Resp. Br. pp. 11-13) Petitioner suggests this notion is an expanded view of §8(d), which allows unions to achieve, among other things, the representation of assets not people, an improper organizing and bargaining tool, and the practical elimination of the boundaries of existing bargaining units. Intervenor argues that none of these points are "at issue," and that cases like *Newspaper Printing Corp. v. NLRB,* 625 F.2d 956 (CA 10 1980), are not at odds with this opinion. This suggestion is demonstrably wrong.

For example, a principle issue in *Newspaper Printing Corp., id.,* was whether an employer went too far in seeking a clause granting it control over the placement of work into or out of the bargaining unit. The Tenth Circuit ruled that the Company had violated §8(a)(5) because the so-called "jurisdiction" clause contained the effective right to control who was and was not represented, a non-mandatory issue. (*Id.* at 625 F.2d 956 at 963, 964) Similarly, this successorship clause on its face, and particularly in conjunction with its companion clauses in Articles I and II, binds all the assets of the present (or future) company to the union, whether the assets are used by workers in or out of the unit. It requires that employees using the assets conform *in all respects* to the contract including representation. (See Pet. App. E1-E7)

Thus, the language effectively expands the bargaining unit to the entire company, and any purchasers of any part thereof *and their entire company,* no matter the employees' union af-

filiation or representational desires.[4]

This clause was not a narrowly drawn piece of language, nor did the union ever suggest its scope be modified or limited. The Circuit's approval of this clause under the "vitally affects" test contrasts sharply with its own decision in *Newspaper Printing Corp., supra,* as well as the rule expressed in *Hess Oil & Chemical Corp. v. NLRB,* 415 F.2d 440 (5th Cir. 1969), cert. denied 397 U.S. 916; and *Doud's v. Int. Longshoremen's Assoc.,* 241 F.2d 278 (2d Cir. 1957). The conflict is evident and should be settled by this Court.

Another result of this kind of successor clause is the possibility that the *nature of union representation under the statutes could change.* Unions represent people, not assets or work. 29 U.S.C. §159(a).[5] See *University of Chicago v. NLRB,* 514 F.2d 942 (CA 7 1975); *Boeing Co. v. NLRB,* 581 F.2d 793 (CA 9 1978). As Member Walther's dissent observed, this clause does not necessarily save the jobs of the employees of this unit, but the union and its contract are definitely preserved. (Pet. App. C13–C20) It is highly questionable whether §8(d) can properly allow bargaining for an agreement that ties union representation to the assets of an employer versus the employees in the bargaining unit.

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[4] Moreover, at the time of the strike, the "coal lands" clause was a part of the contract which would have been carried forward. It should not be heard that the "coal lands" clause could have been excised through a "savings clause." This begs the point. The UMWA never offered to limit the application of the contract, though it was modified to require that the union first become the representative at the other locations prior to application.

[5] 29 U.S.C. §159(a) of the Act reads in pertinent part,

> The Union . . . "shall be the exclusive representatives of all the *employees* in such unit for the purpose of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment." (Emphasis added.)

Another serious question worthy of review is that these kinds of successor clauses *inhibit bargaining* and promote so-called "Top Down" organizing. This Court in *Connell Construction Co., Inc. v. Plumbers & Steamfitters Local 100,* 421 U.S. 616 at 632 (1975), condemned, this method of organizing activity in the context of a §8(e) decision. The parallel in the §8(d) context raised by this case is striking. This Court should decide whether *present* bargaining for *future* employers and units which results in a "Top Down" organizing scheme is outside the scope of §8(d) *vis a vis* the unit at issue and the present employer. This kind of successor clause *prevents* new employers, and new employees alike, from negotiating their own agreement. Indeed, that was one of the stated union goals. (Pet. App. A26–A27, n.25)

The only rationale underlying the NLRB's approval of this policy are that the same employees *would* work the mine after a sale, and that any new employer (or employees) *would not* wish to make changes and negotiate their own best deal. (NLRB Opp. Br. pp. 4-5) This Court should decide whether §8(d) may be expanded on this kind of speculation.

NLRB and Intervenor condemn Lone Star for suggesting that there are conflicts in principle between the Tenth Circuit's successor ruling and any other Court's decision. Both were particularly assertive that the Third Circuit's decision in *Amax Coal Co. v. NLRB,* 614 F.2d 872 (1980) reversing in part 238 NRLB 214, petitions for cert. pending, Nos. 80-289 and 80-692, did not conflict with the Tenth Circuit Court's successorship decision below. (NLRB Opp. Br. pp. 4-5) (Int. Resp. Br. pp. 6-7) Apparently overlooked in their haste to observe the obvious fact that the *Amax* court specifically declined to rule on the successor paragraph in the §8(d) context, is the Tenth Circuit suc-

cessorship decision's clear departure from the two-pronged exception to the "vitally affects" test set forth in *Teamsters Union v. Oliver,* 358 U.S. 283 (1959). In *Oliver, id.,* clear limits were placed on the "vitally affects" exception to §8(d). Critical to the test are findings that:

(a) there is no other means available to address the problem,

and

(b) that the clause at issue is a direct and narrow approach to the perceived problem. (*Id.* at 178-179)

The successorship decision below flatly failed this test.

Finally, the NLRB and Intervenor suggest that there is absolutely no conflict between the Tenth and Third Circuit opinions because the *Amax* court expressly declined to review the successorship paragraph as against §8(d). (NLRB Opp. Br. p.5, citing *Amax, supra,* at 887, n.13) Both imply that Petitioner suggested a different ruling than that rendered. Both are wrong. (Int. Resp. Br. p.6) While Lone Star's Petition could have been more specific in its reference to a conflict *in principle* between the tests used in the Circuits, this does not render the disparate enunciation of the "vitally affects" test between the two Courts any less in conflict.[6]

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[6] Intervenor's confusion might stem from Petitioner's use of the term "successor language" in its discussion of the *Amax* decision's ruling on the "enabling clause." (Pet. Br. p.13) As Petitioner plainly wrote in its Statement of Facts, the term "successor clause" and "enabling clause" have sometimes been used interchangeably in this case. (Pet. Br. p.5) The successor paragraph *is* the second paragraph of the enabling clause. (Pet. App. E1) Petitioner's reference to a conflict, as stated in its *reasons for granting the writ,* was to the disparate view of the "vitally affects" exception to §8(d) between the "coal lands" decision of the Third Circuit and the Tenth Circuit successor decision; a conflict *in principle* not decision.

In *Amax, supra,* the court found the "coal lands" clause overly broad pursuant to the traditional two-pronged application of the "vitally affects" exception. The *Amax* court carefully distinguished "wages, hours, and conditions of employment" *versus those subjects outside that definition, such as the scope of a bargaining unit.* (614 F.2d at 884) In contrast, the Tenth Circuit successorship decision made no such distinction and ignored the possibility that a narrower clause or clauses might have accomplished a legitimate goal without other consequences.

B. The successor language as a violation of §8(e).

The decisions below rest entirely on excised phrases from the context of the contract, and the unwarranted statutory interpretation that §8(e) may be interpreted to allow distinctions between various *kinds* of "doing business." Only after this "surgery" was it concluded that the "spirit" of §8(e) had not been violated. In contrast, this court in *National Woodwork Mfg. Assoc. v. NLRB,* 386 U.S. 612 (1967), ruled that if *an object* of a clause is secondary, the entire clause must fail. (*Id.* at 645) To be true work preservation clauses two tests must be passed. First, the preservation of work traditionally performed must be *the* object. Second, the contracting employer must have the power to give the work to the employees. See *NLRB v. Enterprise Assoc. of Pipefitters,* 429 U.S. 507, 517 (1977). Both tests are failed here. This clause preserves primarily the *union.* Further, the contracting employer has no present power to bind neutrals unless it enmeshes neutrals by contract. The tests used in the decisions below reached an opposite result, and allow the contracting employer to enmesh neutrals as a condition of doing business.

Contrary to the NLRB suggestion (Opp. Br. p.9), *Universal Camera Corp. v. NLRB,* 340 U.S. 474 (1951), does not stand for the proposition that so-called factual disputes are unreviewable. Even assuming this kind of statutory interpretation case involved pure questions of fact, *Universal Camera, id.,* specifically cautions the Circuit Courts not to abrogate their reviewing responsibilities, it reads:

> (5) We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act direct that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Courts of Appeals. The Board's findings are entitled to respect; but they must nonetheless be set aside when the records before a Court of Appeals clearly precludes the Board's decision from being justified by a fair estimate of worth of the testimony of witnesses or its informed judgment on matters within its special competence or both. (340 U.S. 474 at 490)

The decision below failed this test. For example, the NLRB argument that the term "successor" as used in the contract refers to the legal term of art, is highly unlikely and totally insupportable in the record. (NLRB Opp. Br. p.9, n.9) Moreover, no guidance is given on what is or is not an "asset" versus inventory and/or products so as to avoid mid-contract disputes about the

kind of transactions this clause governs.[7]

Factually, the NLRB never addressed the scope of the successor clause and its interdependence on the rest of the contract. It apparently viewed this task as unnecessary because of its conclusion that "assets" are unprotected by §8(e). Thus, the suggestions in the NLRB's Opposing Brief that this Court should not meddle in a "factual determination" is plainly wrong. The Circuit Court's findings were *de novo.* (NRLB Opp. Br. p.9) Of less note is the Intervenor's argument that a purchaser *would become* an "ally," after a sale thus presumably justifying the denial of §8(e)'s protection. (Int. Resp. Br. p.17) The indisputable fact ignored by both the NLRB and Intervenor is that this UMWA successor clause is *presently* achieving a secondary result through an advance agreement with a primary employer. In short, this clause forces a primary employer to create sufficient contractual ties with a neutral so as to vitiate their neutral status and protection under §8(e). Upholding this result would threaten the well-developed law in the area of secondary boycotts.

Further, the successor clause and its subsidiary specific clauses are all clearly enforcable against lease and assignment as well as sales. While the Circuit Court recognized that both the general and specific clauses *could* govern leasing, it then ruled that since the specific clauses *did not* require that the entire UMWA

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[7] The Union suggests that even if there were "ambiguous" clauses susceptible of an §8(e) interpretation, the *ambiguity would be resolved against the union.* (Int. Resp. Br. p.22) It is precisely this kind of mid-contract dispute over "ambiguity" that Lone Star feared. Lone Star suggests there will indeed be disputes and that *an* object of the language is clearly secondary. The time frame for examination and resolution of the possible §8(e) "ambiguities" is at the point of the negotiations and strike, not after an agreement on a case by case dispute over what the contract says. Any other rule subjects employers to waiting for the injury and a series of arbitrations over §8(e) issues prior to any redress.

contract be assumed, there was no secondary violation because the clause was overbroad. The court was *plainly wrong* in this holding in two respects. The Circuit in *Amax,*[8] and the NLRB both held that most of the specific clauses dealing with subcontracting and leasing *were* secondary in nature requiring that the union go along. Second, *no matter what rule of common law contract construction is used* the specific leasing clauses simply do not cover all the forms of lease and contract used in the industry. The successor clause does. Thus, that clause prohibits certain kinds of leasing and subcontracting on its face.

Respectfully submitted,

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[8] *Amax Coal Co. v. NLRB,* 614 F.2d 872, (1980) reversing in part 238 NLRB 214, petitions for cert. pending, Nos. 80-289 and 80-692.